In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 628

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee has moved to dismiss the appeal on the ground that the judgment below was not rendered in an action required to be heard and determined by a district court of three judges, and that this Court accordingly does not have jurisdiction under 28 U. S. C. 1253. Specifically, appellee takes the position that this action does not involve the constitutionality of Section 513 of the National Housing Act because that provision was not designed to have retrospective effect. We submit that there is no merit whatever to this contention.

1. This is not the first time that this litigation has reached this Court. The Federal Housing Administration now appeals from a decree of a district court

of three judges. During the past term, appellant appealed from a substantially identical decree granted by a single district judge.[1] Appellant's jurisdictional statement in the prior case challenged the power of the single district judge to grant a decree invalidating an act of Congress.[2] Appellee did not file any motion or other paper supporting the jurisdiction of the single district judge. This Court noted probable jurisdiction, summarily reversed the judgment, and remanded the case for consideration by a three-judge district court because the action was required to be heard and determined by a three-judge district court. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

Nonetheless, the same appellee now asks this Court to disavow its earlier decision and to dismiss this appeal on the ground (contrary to its own earlier ruling) that the case did not have to be heard and determined by a district court of three judges. We submit that the circumstances call for strict adherence to the fundamental consideration that orderly judicial procedure does not permit a relitigation of previously determined issues. Cf. *Insurance Group* v. *Denver & Rio Grande Western R. Co.*, 329 U. S. 607, 612.

2. In any event, the previous holding of this Court—that the ruling of the single district judge (now adopted by the three-judge court) constituted a re-

[1] See Appendix, *infra*, pp. 5–7. The opinion of the district court of three judges adopted the findings and conclusions of the single district judge "[w]ith one minor correction and a brief comment" (cf. Jurisdictional Statement, p. 22).

[2] See Jurisdictional Statement, pp. 3, 19–21, in No. 599, O. T. 1956.

straint upon the enforcement of an Act of Congress for alleged repugnance to the Constitution—was clearly correct. The district court's decision was not, and could not have been, based on the theory that the civil sanctions of Section 513 of the National Housing Act were not designed to apply to buildings constructed prior to the passage of the Housing Act of 1954. For Section 513 (d) shows explicitly that Congress proposed to cover housing insured "prior to the effective date" of the 1954 Act. That section reads:

> The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under the Act * * *[3]

Appellee, itself, plainly recognized the retrospective aspect of the statute and challenged its constitutionality on that basis. (R. 15; see also R. 16.) And the opinions of the three judge court and of the single-judge court make it clear that the district court was passing on the congressional power to impose upon appellee what was considered to constitute a new obligation.[4]

In sum, there can be no doubt that appellee sought an injunction on the ground that the retrospective

---

[3] A proviso of Section 513 (d) (Jurisdictional Statement, p. 56) contains a significant exception required by the constitutional prohibition against criminal *ex post facto* laws.

[4] See, *e. g.*, Jurisdictional Statement, pp. 24, 41–42, 43, 49.

features of Section 513 were repugnant to the Constitution, and that the court below rested on that ground. The action thus was required to be heard and determined by a court of three judges (28 U. S. C. 2282) and this Court alone has jurisdiction to review the decision below (28 U. S. C. 1253, 1291).

CONCLUSION

The motion to dismiss should be denied and this Court should note probable jurisdiction.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

JANUARY 1958.

APPENDIX A

(Prior Judgment of Single-Judge District Court)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

DECREE

This cause came on to be heard upon plaintiff's complaint by way of declaratory judgment and defendant's motion to dismiss the complaint under Rule 12 (c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented by both parties, and upon consideration thereof, the Court having filed its opinion on June 21, 1956, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of

less than thirty days, provided the required priorities are maintained for the persons entitled thereto, namely, veterans of World War II, and their immediate families, and provided that no proper person desiring occupancy for a period of thirty days or more is thereby precluded from obtaining unfurnished accommodations, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered. The parties have stipulated that, for the purpose of the Court's opinion filed herein, the maximum number of apartments available for lease for terms of less than thirty days shall not exceed fifteen percent of the total number of apartments in the project until the further order of Court or subsequent agreement between the parties.

(2) The plaintiff shall promptly submit to the defendant a proposed schedule of the maximum average rentals (including furniture and other incidentals and services) for any furnished accommodations in said building, and if fair and reasonable, under all the circumstances, the defendant shall promptly approve said schedule without regard to any monthly rental schedule heretofore approved, and in approving said schedule, the defendant shall take into consideration extra services and incidentals necessarily furnished with such apartments which may be rented for less than thirty days, and the plaintiff shall thereupon be enjoined from making any rental charges directly or indirectly in excess of the approved schedule.

(3) The defendant may not insist upon the execution by the plaintiff of any agreement to desist from

renting for periods of less than thirty days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three years, irrespective of the minimum time of leasing.

(4) The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters, of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel, or post any signs indicating its ability to accept any tenant for periods of any particular duration; nor shall it provide bell boy or food and beverage room service.

(5) The taxable costs of this action, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

(6) Should either party file a notice of appeal within the time permitted from the date of entry of this Decree, the effectiveness of said Decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an appeal to said Decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

(Sgd.) WALTER E. HOFFMAN,
United States District Judge.

NORFOLK, VIRGINIA,
July 18, 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956